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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEB 17 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of:)
)
Implementation of Section)
309(j) for Competitive)
Bidding)
)
)
Reexamination of the Policy)
Statement on Comparative)
Broadcast Hearings)
)
)
Proposals to Reform the)
Comparative Hearing Process)

MM Docket No. 97-234

GC Docket No. 92-52

GEN Docket No. 90-264

To: The Commission

REPLY COMMENTS OF WILLSYR COMMUNICATIONS, LIMITED PARTNERSHIP
IN RESPONSE TO NOTICE OF PROPOSED RULEMAKING

Respectfully submitted,

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February 17, 1998

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REPLY COMMENTS OF WILLSYR COMMUNICATIONS

Willsyr Communications, Limited Partnership ("Willsyr"), by its counsel, pursuant to 47 C.F.R. 1.415 and 1.419, hereby submits its reply comments in response to the "Notice of Proposed Rulemaking" in MM Docket No. 97-234, GC Docket No. 92-52, and GEN Docket No. 90-264, rel. November 26, 1997. Therein, the Federal Communications Commission ("FCC") requested comments with respect to: (a) implementation of Section 309 as to competitive bidding for commercial broadcast licenses; (b) reexamination of the policy statement on comparative hearings; and (c) proposals to reform the comparative hearing process to expedite resolution of cases. Comments were received by the FCC on January 26, 1998.

Reply to Comments of Orion

Orion Communications Limited ("Orion"), which is a competing applicant against Willsyr in the Biltmore Forest, North Carolina, proceeding, filed comments in support of readopting a comparative criteria that would assure its grant. These comments contain erroneous statements of facts and misleading arguments.

(a) Orion's Contention that Bechtel is Not Applicable to It is Erroneous

In its comments, at pp. 2-4, Orion contends that Bechtel should not apply in its case because "but for the FCC's willingness to tolerate a pattern of repetitive and discredited motions for reargument [by the other competing applicants], [it] quite probably would have received permanent licensure years ago." However, Orion is simply wrong as to the facts and to the law.

The FCC first rendered a decision and initially granted a conditional construction permit to Orion on February 28, 1992,

based wholly on the "integration" criteria. This was before any requests for reconsideration had been filed by the other competing applicants and was less than one month after the D.C. Circuit issued its first decision on January 31, 1992, in Bechtel v. FCC, 957 F.2d 873.

In the January 31, 1992, Bechtel decision, the D.C. Circuit first questioned the "integration" criteria as "arbitrary and capricious." It then first started remanding such comparative proceedings for reconsideration by the FCC as to its continuing use of the "integration" criteria.

Thus, had the other competing applicants immediately appealed to the D.C. Circuit in March 1992, the proceeding would have nevertheless been remanded to the FCC to reconsider its grant to Orion based upon the then questionable "integration" criteria. Accordingly, the conditional grant to Orion would have been unsettled by Bechtel, even if no petitions for reconsideration had been filed with the FCC in 1992 by the other competing applicants.

Orion, moreover, misunderstands the nature of the petitions for reconsideration filed with the FCC by the other competing applicants. The first petition was filed by Skyland Broadcasting Company on March 30, 1992. Therein, Skyland raised the issue of the continuing viability of the "integration" criteria in light of the January 31, 1992, decision in Bechtel.

In Liberty Productions, 7 FCC Rcd 7581, 7586, para. 35 (1992), the FCC determined on reconsideration that the "integration"

criteria would nevertheless still apply to any proceedings where hearings had already been held. However, in Bechtel v. FCC, 10 F.3d 875 (1993), the D.C. Circuit subsequently rejected this determination of the FCC and invalidated the use of the "integration" criteria in proceedings where hearings had already been held.

Accordingly, contrary to the contentions of Orion, the March 30, 1992, petition for reconsideration filed by a competing applicant raised legal arguments which were legally correct and which were not repetitious. It timely raised issues, pursuant to Bechtel, which could not have previously been raised. The FCC's dismissal of those issues was later held improper by the D.C. Circuit. See also, Order, Case No. 92-1645, filed March 15, 1994.

Orion further ignores that a December 23, 1992, petition for reconsideration filed by a competing applicant challenges the FCC's treatment of April 3 and 24, 1992, motions to reopen the record and to enlarge the issues against it. These motions presented uncontroverted evidence of substantial IRS tax liens against Orion and its principals. In the event that new hearings are held, these motions are still ripe for consideration.

(b) Orion's Improper Reliance on its Grant of Interim Authority

In its comments, at pp. 2-3, Orion notes that the D.C. Circuit granted it interim operating authority on December 19, 1997. See, Decision, Case No. 96-1430. According to Orion, this gives it an "equitable" basis to be awarded the permanent license. However,

that decision is limited to interim operating authority. See, Decision, p. 12.

Orion, at p. 3, contends that its past and current interim operation on the Biltmore Forest FM frequency is an "equitable" consideration to award it the permanent license. However, a prior investment in a station as a result of interim operating authority can not legally be used as a basis to award a permanent license. Consolidated Nine, Inc. v. FCC, 403 F.2d 585, 589, 593 (D.C. Cir. 1968).

(c) Orion's Threat to Litigate if an Auction is Utilized

In its comments, at p. 5, Orion threatens to litigate and to tie up in court the winning applicant if an auction is used. Such threats are an abuse of process and should not be tolerated by the FCC.

(d) Orion's Proposed Comparative Criteria is Not Legally Valid

In its comments, at Exhibit 1, Orion proposes comparative criteria for the FCC to utilize. This includes local residence and civic participation in the local area. However, as noted in the Notice of Proposed Rulemaking, at para. 19, pp. 9-10, the continued consideration of local residence and civic participation is effectively precluded by Bechtel.

Moreover, apart from Bechtel, use of local residence and civic participation would be a denial of equal protection of the law under the U.S. Constitution. This unduly narrow criteria would exclude over 99% of the U.S. population from competing for any

given frequency. Because broadcast frequencies are owned by the public, all members of the public, regardless of where they live, must have a fair chance to compete for the frequency.

Orion also proposes that the hearing record not be reopened to consider new evidence. However, this proposal raises substantial "due process" problems. The existing hearing record in the Biltmore Forest proceeding is almost 10 years. Much has changed in that time. Moreover, if new matters arose, such as an applicant being convicted of a felony, or violating FCC rules, these character issues could not be considered under Orion's proposal.

General Reply Comments

Several other parties filing comments urged the FCC to simply readopt the comparative criteria which was invalidated by Bechtel v. FCC, 10 F.3d 875. However, because of Bechtel such criteria can not legally be readopted. The Bechtel decision, moreover, expressly applies to those proceedings which have already been in hearing and where the FCC has already rendered a decision. Indeed, in those cases which were on appeal to the D.C. Circuit, the FCC's decisions were reversed in light of Bechtel.

WHEREFORE, in view of the foregoing, it is requested that the FCC immediately adopt rules and procedures for the permanent grant of licenses in the pending proceedings which are fair and equitable to all the applicants.

Respectfully submitted,

WILLSYR COMMUNICATIONS,
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February 17, 1998

CERTIFICATE OF SERVICE

I, Stephen T. Yelverton, an attorney, do hereby certify that on this 17th day of February, 1998, I have caused to be filed with the Secretary of the Federal Communications Commission an original and nine copies of the foregoing "Reply Comments of Willsyr Communications, Limited Partnership," and copies were served on the following offices and interested persons:

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Service has also been made on
all other parties to MM Docket
No. 88-577


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